

NO. 34926-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DONALD ZACK,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

Yakima County Cause No. 16-1-01637-1

The Honorable Richard Bartheld, Judge

REPLY BRIEF OF APPELLANT

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ADDITIONAL FACTS

Upon submission of Proclamation 14-01, Governor Inslee sent a letter to Assistant Secretary of the Interior for Indian Affairs, clarifying his intent regarding the scope of the criminal jurisdiction the state wanted to retrocede on the Yakama Reservation. He noted in this letter, however, that the power over final approval of retrocession rested with the U.S. Department of the Interior. Appendix A, p. 1.¹

In the letter, Governor Inslee specified that he intended the proclamation to be read to retain criminal jurisdiction with the state in cases involving “non-Indian defendants *and/or* non-Indian victims,” despite the fact that the language of the proclamation itself retained jurisdiction for the state only in cases with “non-Indian defendants and non-Indian victims.” Appendix A, p. 2 (emphasis in original); CP 36. The Governor asked the Department of the Interior to “make this clear in the notice accepting the retrocession Proclamation.” Appendix A, p. 2.

But the Department of the Interior denied Governor Inslee’s request. *See* Appendix B.² Instead, the Assistant Secretary emphasized that the Department of the Interior was accepting retrocession as outlined

¹ Governor Inslee’s January 27, 2014 letter is attached as Appendix A. It is also available online at: <http://www.yakimacounty.us/documentcenter/home/view/941>.

² Assistant Secretary of the Interior for Indian Affairs Kevin Washburn’s October 19, 2015 letter is attached as Appendix B. It is also available online at: <https://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-031964.pdf>.

by the language of the Governor's Proclamation, regardless of any extraneous statements of intent:

We understand the Proclamation to be the final product resulting from the formal government-to-government meetings [required by RCW 37.12.160]. We also believe that the Proclamation is plain on its face and unambiguous. We worry that unnecessary interpretation might simply cause confusion. If a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of the plain language of the Proclamation. In sum, it is *the content of the Proclamation* that we hereby accept in approving retrocession. Appendix B, p. 5 (emphasis added).³

ARGUMENT

I. THE FEDERAL GOVERNMENT EXPLICITLY REJECTED GOVERNOR INSLEE'S PROPOSED INTERPRETATION OF THE RETROCESSION PROCLAMATION, UPON WHICH THE STATE'S ARGUMENT RELIES.

A state has no inherent criminal jurisdiction over any offense occurring in Indian Country; a state possesses only the authority given to it by the by the federal government. U.S. Const. Art. IV, cl. 2; Art. I, sec. 3, cl. 8; *State v Jim*, 173 Wn.2d 672, 678, 273 P.3d 434 (2012); *State v. Comenout*, 173 Wn.2d 235, 238, 267 P.3d 355 (2011); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481, 96 S.Ct. 1643, 48 L.Ed.2d 96 (1976); *Bryan v. Itasca Cnty.*, *Minnesota*, 426 U.S. 373, 376, n. 2, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).

³ See also: Acceptance of Retrocession of Jurisdiction for the Yakama Nation, 80 Fed. Reg. 202 (Oct. 20, 2015) (declaring that retrocession has been accepted by the Department of the Interior as outlined in the Proclamation itself).

Congress has authorized the federal government to accept (or reject) a state's request for retrocession of jurisdiction it assumed in Indian Country under PL 280. 25 U.S.C. 1323.

President Johnson delegated that authority to the Secretary of the Interior by executive order. Executive Order 11435, Fed. Reg. 17339 (Nov. 23, 1968). The Secretary of the Interior, in turn, re-delegated the authority to the Assistant Secretary for Indian Affairs. *See* 80 Fed. Reg. 202 (Oct. 20, 2015).

Accordingly, the jurisdictional issue raised by Mr. Zack's case turns on analysis of the measure of jurisdictional retrocession accepted or rejected by the Department of the Interior, not on the Governor's intent. *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971); *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds sub nom. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978); *Omaha Tribe of Neb. v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971) (Omaha I), *aff'd sub nom. Omaha Tribe of Neb. v. Vill. of Walthill, Neb.*, 460 F.2d 1327 (8th Cir. 1972) (Omaha II).⁴

⁴ Despite substantial authority to the contrary, the state nonetheless claims that "The substance of what the state retroceded...is a question of state law." Brief of Respondent, p. 13 n. 7 (*quoting Tyndall v. Gunter*, 840 F.2d 617 (8th Cir. 1988)).

(Continued)

In *Brown*, for example, the defendants argued that the State of Nebraska had exclusive criminal jurisdiction because the resolution passed by the state legislature retroceding all jurisdiction on an Indian reservation to the federal government was invalid under state law because it was never signed by the Governor. *Brown*, 334 F. Supp. at 538. Even assuming that the resolution was invalid under state law, the *Brown* court found that retrocession was still effective because it had been properly accepted by the Department of the Interior under federal law. *Id.* at 540-41. This was because of the federal government's plenary power over Indian affairs. *Id.* at 540. The *Brown* court also noted that any state authority in Indian Country was purely at the whim of the federal government. *Id.* Indeed, the federal government could have chosen to remove the state's criminal jurisdiction without any action at all on the part of state government. *Id.*

Similarly, the Ninth Circuit held in *Lawrence* that the Department of the Interior had properly accepted retrocession of state criminal jurisdiction on the Suquamish Reservation regardless of whether the

But the state ignores the context of that statement in *Tyndall* and omits a critical phrase of the sentence it quotes.

In *Tyndall*, the defendant was convicted in state court of an offense that occurred before retrocession took place. His conviction as also entered before retrocession went into effect. His sentencing hearing, however, occurred one day after retrocession. In this context, the Eighth Circuit held that the state had authority to sentence him because "...the substance of what Nebraska retroceded, or *more specifically, what Nebraska did with the criminal cases pending in its courts*, is a question of state law." *Id.* at 618 (emphasis added). *Tyndall* is inapposite to Mr. Zack's case and the state's reliance upon it is misplaced.

Governor's proclamation of retrocession was proper under Washington State law. *Lawrence*, 595 F.2d 1149 (citing *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds sub nom. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)).

Even so, the state argues that Governor Inslee's intent upon issuing Proclamation 14-01 is the key to the analysis of the jurisdiction retained by the state on the Yakama Reservation post-retrocession. *See* Brief of Respondent *generally*. But, the intent of state actors – and even the validity of their actions under state law – is inapposite. Instead, the question turns on the measure of retrocession accepted by the Department of the Interior. *See Brown*, 334 F. Supp. 536; *Lawrence*, 595 F.2d at 1151; *Oliphant*, 544 F.2d 1007; *Omaha I*, 334 F. Supp. 823.

Here, the Department of the Interior explicitly rejected the Governor's proposed interpretation of the retrocession proclamation by denying his request to memorialize it in the notice accepting retrocession. *See* Appendix A, p. 2; Appendix B, p. 5. Instead, the Assistant Secretary accepted only the plain language of the proclamation. Appendix B, p. 5. As argued in Mr. Zack's Opening Brief, that plain language dictates against state jurisdiction over his alleged offense.

II. THE STATE’S ARGUMENT REGARDING INTERPRETATION OF THE PROCLAMATION GRANTING RETROCESSION “IN PART” IS MISPLACED.

The Yakama Nation requested that the state retrocede all civil and criminal jurisdiction over the totality of Yakama Indian Country⁵, “both within and without the external boundaries of the Yakama Reservation.” CP 35-36. But the state did not consent to retrocede any civil or criminal jurisdiction outside the boundaries of the reservation. CP 37.

Accordingly, the state agreed to the requested retrocession only “in part.” CP 36.

Nonetheless, Respondent argues that this Court must accept the state’s proposed interpretation of Proclamation 14-01 in order to give effect to the words “in part.” Brief of Respondent, pp. 15-17. The state’s argument ignores the other portions of the Proclamation and is inaccurate.

CONCLUSION

For the reasons set forth above and in the Opening Brief, Mr. Zack’s conviction must be reversed and the charge against him must be dismissed for lack of jurisdiction.

⁵ “Indian Country” includes land both within and outside of an established reservation. 18 U.S.C. 1151. Outside of a reservation, the term refers to dependent Indian communities as well as Indian allotments to which Indians still possess title and rights-of-way running through those allotments. 18 U.S.C. 1151.

Respectfully submitted on July 13, 2017,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Donald Zack
401 Shix Neet Street, POB 24
Wapato, WA 98951

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Yakima County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on July 13, 2017.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

APPENDIX A



STATE OF WASHINGTON
Office of the Governor

Received by KCPA

APR 15 2014

Initial: TCH

PROCLAMATION BY THE GOVERNOR
14-01

WHEREAS, on March 19, 2012, Governor Christine Gregoire signed Engrossed Substitute House Bill 2233, "Creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country"; and

WHEREAS, Engrossed Substitute House Bill 2233, which became Chapter 48, Laws of 2012, creates a process by which the state of Washington (hereafter, "the State") may retrocede to the United States all or part of the civil and criminal jurisdiction previously acquired by the State over a federally recognized Indian tribe, and the Indian country of such tribe, under federal Public Law 280, Act of August 15, 1953; and

WHEREAS, on March 13, 1963, in accordance with federal Public Law 280, Act of August 15, 1953, the State assumed partial civil and criminal jurisdiction, subject to the limitations in RCW 37.12.021 and RCW 37.12.060, within the Indian country of the Confederated Tribes and Bands of the Yakama Nation (hereafter, "Yakama Nation") pursuant to Chapter 36, Laws of 1963; and

WHEREAS, after March 13, 1963, the Yakama Nation did not invoke with the State the provision of RCW 37.12.021 but chose to rely upon the rights and remedies of its Treaty of 1855 with the United States, 12 Stat. 951 and federal laws; and

WHEREAS, on January 11, 1980, the Assistant Secretary-Indian Affairs, United States Department of the Interior, approved the Yakama Nation's petition for re-assumption of jurisdiction over Indian child custody proceedings under the Indian Child Welfare Act of 1978. Effective March 28, 1980, the Yakama Nation reassumed jurisdiction over Yakama Indian child custody proceedings; and

WHEREAS, on July 17, 2012, the Yakama Nation filed a retrocession petition with the Office of the Governor. The retrocession petition by the Yakama Nation requests full retrocession of civil and criminal jurisdiction on all of Yakama Nation Indian country and in five areas of RCW 37.12.010, including: Compulsory School Attendance; Public Assistance; Domestic Relations; Juvenile Delinquency; and Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways; and

WHEREAS, Governor Gregoire convened government-to-government meetings with the Yakama Nation to discuss the Nation's retrocession petition. In the course of those meetings, the Yakama Nation and Governor Gregoire confirmed that the Yakama Nation asks the State to retrocede all jurisdiction assumed pursuant to RCW 37.12.010 in 1963 over the Indian country of the Yakama Nation, both within and without the external boundaries of the Yakama Reservation. However, the Yakama Nation requests that the State retain jurisdiction over mental illness as provided in RCW 37.12.010(4), and jurisdiction over civil commitment of sexually violent predators under RCW 71.09, and acknowledges that the State would retain criminal jurisdiction over non-Indian defendants; and

WHEREAS, Governor Jay Inslee convened further government-to-government meetings between the State and Yakama Nation. The Governor's Office has also consulted with elected officials from the jurisdictions proximately located to the Yakama Nation's Indian country; and

WHEREAS, on July 9, 2013, Governor Inslee exercised the six-month extension provision for issuing a proclamation, pursuant to RCW 37.12.160; and

WHEREAS, strengthening the sovereignty and independence of the federally recognized Indian tribes within Washington State is an important priority for the State; and

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, by virtue of the authority vested in me by Section 37.12.160 of the Revised Code of Washington, do hereby grant in part, and deny in part, the retrocession petition submitted by the Confederated Tribes and Bands of the Yakama Nation, according to the following provisions:

1. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede full civil and criminal jurisdiction in the following subject areas of RCW 37.12.010: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency.
2. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims.
3. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, criminal jurisdiction over all offenses not addressed by Paragraphs 1 and 2. The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims.

4. Jurisdiction over Indian child custody proceedings under RCW 37.12.010(3) and Adoption proceedings and Dependent Children pursuant to RCW 37.12.010(6) and (7), which the Yakama Nation reassumed in 1980 under the Indian Child Welfare Act, shall remain under the exclusive jurisdiction of the Yakama Nation.
5. Outside the exterior boundaries of the Yakama Reservation, the State does not retrocede jurisdiction. The State shall retain all jurisdiction it assumed pursuant to RCW 37.12.010 in 1963 over the Yakama Nation's Indian country outside the Yakama Reservation.
6. Nothing herein shall affect the State's civil jurisdiction over the civil commitment of sexually violent predators pursuant to chapter 71.09 RCW and the State must retain such jurisdiction notwithstanding the completion of the retrocession process authorized under RCW 37.12.160.
7. Pursuant to RCW 37.12.010, the State shall retain all jurisdiction not specifically retroceded herein within the Indian country of the Yakama Nation.
8. This Proclamation does not affect, foreclose, or limit the Governor's authority to act on future requests for retrocession under RCW 37.12.160.


Signed and sealed with the official seal of the state of Washington this 17th day of January, A.D. Two-thousand and Fourteen, at Olympia, Washington.



By:

Jay Inslee, Governor

BY THE GOVERNOR:


Secretary of State

JAY INSLEE
Governor



STATE OF WASHINGTON
Office of the Governor

January 27, 2014

The Honorable Kevin Washburn
Assistant Secretary of Indian Affairs
U.S. Department of Interior
MS-4141 –MIB
1849 C. Street, N.W.
Washington, D.C. 20240

Re: Yakama Nation Retrocession Petition

Dear Assistant Secretary Washburn:

Pursuant to 25 U.S.C. §1323 and Revised Code of Washington (RCW) 37.12, I have included the attached proclamation, signed by me on January 17, 2014. The proclamation addresses a retrocession petition submitted by the Confederate Tribes and Bands of the Yakama Nation in Washington State.

On March 19, 2012, former Washington State Governor Christine Gregoire signed Engrossed Substitute House Bill 2233. This important piece of legislation created a process by which the state of Washington may retrocede to the United States civil and criminal jurisdiction previously acquired by the State over a federally recognized Indian tribe under federal Public Law 280 in 1953. The bill gives the Governor of the state of Washington the authority to approve, in whole or in part, a retrocession petition submitted by a Washington State Indian tribe. Final approval rests with the U.S. Department of the Interior.

On July 17, 2012, the Yakama Nation filed a retrocession petition with the Office of the Governor requesting full civil and criminal jurisdiction on all of Yakama Nation Indian country in five specific areas of RCW 37.12.010. I believe that the enclosed Proclamation is a great first step towards strengthening the sovereignty and independence of the Yakama Nation.

In paragraph one of the proclamation, the State grants exclusive civil and criminal jurisdiction within the exterior boundaries of the Yakama Reservation in four subject areas of RCW 37.12.010: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency.

In paragraph two, the proclamation also grants to the Yakama Nation civil and criminal jurisdiction within the exterior boundaries of the reservation in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases which do not involve non-Indian plaintiffs, non-Indian defendants, or non-Indian victims. I would note that the proclamation itself states that the State will retain jurisdiction in these cases over civil causes of action involving “non-Indian



plaintiffs, non-Indian defendants, *and* non-Indian victims,” as well as in criminal cases involving “non-Indian defendants *and* non-Indian victims.” The intent set forth in paragraph two, however, is for the State to retain jurisdiction in this area where *any* party is non-Indian, and therefore may be more properly read in both instances as the State retaining jurisdiction in those cases involving “non-Indian plaintiffs, non-Indian defendants *and/or* non-Indian victims.” I respectfully request that the Department make this clear in the notice accepting the retrocession Proclamation.

Finally, in paragraph three of the proclamation, the State is also retroceding criminal jurisdiction within the exterior boundaries of the reservation over all offenses not specifically addressed in paragraphs one and two, which do not involve non-Indian defendants or non-Indian victims. Again, I would note that in this paragraph the proclamation states that the State retains jurisdiction over criminal offenses involving “non-Indian defendants *and* non-Indian victims,” but the intent is for the State to retain such jurisdiction in those cases involving non-Indian defendants *and/or* non-Indian victims.”

The proclamation does deny part of the petition by the Yakama Nation, and allow the State to retain existing civil and criminal jurisdiction in a limited number of areas. First and foremost, the State is retaining its existing jurisdiction outside of the exterior boundaries of the Yakama Reservation, including all trust and fee lands. Moreover, consistent with the description above, the State is retaining civil and criminal jurisdiction in Operation of Motor Vehicle cases that involve non-Indian plaintiffs, non-Indian defendants, and/or non-Indian victims.

It is important to note that nothing in the proclamation changes the existing jurisdiction the Yakama Nation has over Indian child custody proceedings under RCW 37.12.010(3) and Adoption proceedings and Dependent Children pursuant to RCW 37.12.010(6) and (7). The Yakama Nation reassumed jurisdiction over these subjects in 1980 under the Indian Child Welfare Act, and shall remain under the exclusive jurisdiction of the Yakama Nation.

Similarly, nothing in the proclamation shall affect the State’s civil jurisdiction over the civil commitment of sexually violent predators pursuant to chapter 71.09 RCW and the State must retain such jurisdiction notwithstanding the completion of the retrocession process authorized under RCW 37.12.160.

Thank you for accepting this proclamation on behalf of the state of Washington and for working to bring the retrocession petition to fruition. I look forward to continue working with you and the Yakama Nation on this issue moving forward.

Sincerely,



Jay Inslee
Governor

APPENDIX B



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

OCT 19 2015

The Honorable JoDe Goudy
Chairman, Confederated Tribes
and Bands of the Yakama Nation
P.O. Box 151, Fort Road
Toppenish, Washington 98948

Dear Chairman Goudy:

I am pleased to notify you of our acceptance of retrocession to the United States of partial civil and criminal jurisdiction over the Yakama Nation (Nation).¹ The Department of the Interior (Department) congratulates the State of Washington (State) and the Nation on the careful and deliberative process used to reach agreement on retrocession.² We have attempted to be equally deliberative in our process. We explain below the process of our decisionmaking, the reasons for our decision, and the effective date of complete implementation.

It is important to understand what retrocession means. Some correspondence and media reports reflect confusion about the meaning of retrocession. Retrocession does not affect the Nation's formal legal authority or jurisdiction in any way. Indeed, the Nation's authority neither contracts nor expands in light of retrocession. The Nation's jurisdiction simply will no longer be concurrent with the State's; rather, the Nation's jurisdiction will be exclusive for certain purposes. In its retrocession request, the State wishes to give up a portion of the authority that had been delegated to it by Congress under Public Law 280. The sole legal effect of retrocession is to restore Federal authority to the Federal Government over certain categories of offenses within the Yakama Reservation. In short, the primary effect of retrocession is that the State will transfer back to the Federal Government Federal authority that the State had been delegated under Public Law 280. As a result, under retrocession, the State has chosen to retract state authority, Federal authority will resume, and the Nation's authority will remain the same as it has always been.

The road to retrocession has been a long one for the Nation. We commend the State for establishing a formal procedure on retrocession of state criminal and civil jurisdiction to address this issue proactively and thoughtfully. Engrossed Substitute House Bill 2233, enacted in 2012,

¹ Jurisdiction was previously acquired by the State of Washington pursuant to Public Law 83-280, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 28 U.S.C. 1360, and as provided in Revised Code of Washington 37.12.010, 37.12.021, 37.12.030, 37.12.040, and 37.12.060 (1963), and 37.12.050 (1957).

² The intended acceptance is pursuant to 25 U.S.C. § 1323 and authority vested in the Secretary of the Interior by Executive Order No. 11435 of November 21, 1968, 33 Fed. Reg. 17339, and delegated to the Assistant Secretary – Indian Affairs. It is also pursuant to the request by the State of Washington reflected in the Proclamation of the Governor 14-01, signed on January 17, 2014, and transmitted to the Assistant Secretary – Indian Affairs in accordance with the process set forth in RCW 37.12.160 (2012).

provided a path for the State and tribal nations to follow in addressing retrocession. After filing the retrocession petition with the Governor in July of 2012, the Nation engaged in government-to-governments meetings with the State. The Nation also entered into a 2013 Memorandum of Understanding with Yakima County regarding the procedures to serve state court arrest warrants on tribal members on trust land within the Yakama Reservation. After following the procedures set forth in House Bill 2233, including a 6-month extension by the State, the Governor submitted the Proclamation for our approval in January of 2014.

From the time the Proclamation was submitted, the Office of Justice Services (OJS) within the Bureau of Indian Affairs (BIA) has engaged with the Yakama Nation Tribal Police Department and Corrections to determine the capacity of the Nation's law enforcement services. In preparation for retrocession, the Nation committed additional resources to their law enforcement services. The Nation has nearly doubled the size of the police department by funding 10 new police officer positions. In September of 2014, OJS finalized an assessment of the Nation's Police Department, which found the Nation has the capacity to respond to an increased number of emergency calls for service and would be prepared to handle increased responsibilities as a result of retrocession.

One of the critical elements of success in preparing for exclusive criminal jurisdiction over some offenses committed by Native Americans is an effective tribal court. In December of 2014, OJS began an assessment of the Yakama Nation Tribal Court. This assessment provided recommendations for improving tribal court operational activities and assisted in developing a strategic 3-5 year plan for the court. On May 6, 2015, OJS issued the tribal court assessment and strategic plan, including findings and recommendations. As a result of these findings, \$149,000 in one-time Federal funding was provided to address the following issues: 1) assistance in acquiring necessary equipment, including computers, scanners, and other items, related to the infrastructure of the court; 2) increased salary of law-trained judges; 3) hiring a legal assistant to assist civil pro-se litigants; 4) hiring a court administrator; 5) providing training to tribal judges and tribal prosecutors and defenders on issues involving domestic violence, child abuse, and neglect; and 6) providing relevant training to the court administrator. Discussions have also occurred regarding Fiscal Year 2016 funding for a court management system. Together these efforts will help the Nation further the pursuit of justice and ensure that individuals' rights are protected.

The OJS has also actively engaged in developing partnerships and opening lines of communication between the Nation's police, local law enforcement, county prosecutor's office, the Federal Bureau of Investigation (FBI), and the U.S. Attorney's Office. This has created a more cooperative relationship between law enforcement agencies. As a result, crimes are now less likely to go uninvestigated or unprosecuted.

As is our practice when reviewing retrocession requests, the Department worked closely with the Department of Justice (DOJ) in evaluating the request. In March of 2014, the Department participated in meetings with the DOJ Office of Tribal Justice and the U.S. Attorney's Office in the Eastern District of Washington. On June 16, 2014, the Department formally requested, as set forth in Executive Order No. 11435, the consultation and opinion of the Attorney General with respect to retrocession of criminal jurisdiction. We must work closely with the DOJ in making

this decision because, while the decision is vested with the Department, DOJ has significant equities in light of the additional investigative and prosecution work that is likely to be required of FBI and the United States Attorney's Office in the Eastern District of Washington.

United States Attorney Michael C. Ormsby has been key to our consideration of retrocession. In a letter dated April 3, 2015, to the Acting Deputy Attorney General, the U.S. Attorney expressed caution and stressed the need for careful implementation, but he also noted that the relevant Federal and tribal partners have worked hard in recent years to improve communication and have developed what he described as a "strong, collaborative working relationship[.]" He also noted that the Nation has developed a "symbiotic working relationship with FBI and the USAO" in particular.

The U.S. Attorney vowed to make retrocession successful if it occurs. In his letter, the U.S. Attorney identified with great specificity what needs to happen if retrocession is approved, as well as what has not yet occurred. His guidance has been very helpful. Since law enforcement agencies tend to address matters by priority, it is sometimes difficult to prioritize matters that remain hypothetical. This letter provides the concrete decision that will enable the interested jurisdictions to prioritize plans for implementation.

The U.S. Attorney proposed an implementation period of 6-12 months for law enforcement agencies to develop transition plans. As the chief Federal law enforcement officer in the Eastern District of Washington, his leadership will be crucial in ensuring successful implementation. Accordingly, we have worked his proposal into our decision.

On January 26, 2015, the Department held a formal tribal consultation with the Nation, DOJ, and the United States Attorney's Office to discuss the proposed retrocession. On that occasion, we heard from the Nation the importance of retrocession. We also toured some of the Nation's police training and criminal justice facilities. Since long before statehood for the State of Washington, the Nation and the United States Government have had a government-to-government relationship, evidenced most clearly by the Nation's Treaty with the United States of 1855. The consultation continued that relationship.

During our meetings on the Yakama Reservation, Councilmember Virgil Lewis, who chairs the Tribal Council's Law and Order Committee, advised us of the steps that the Nation has taken to prepare for implementation. He assured us that the Nation has the staff and the employees to undertake law enforcement for the Nation. He was frank and transparent about the opportunities as well as the challenges that retrocession would create. While the Nation's detention center, for example, is a state-of-the-art facility, the tribal court and the police department have certain needs. Following retrocession, the State will no longer have jurisdiction over tribal members as to the offenses for which retrocession has been granted. Thus, the entire responsibility for policing such offenses will rest on the shoulders of the Nation and the United States. As noted above, the Nation's authority has not expanded, but the weight of its responsibility has indeed increased. Accordingly, tribal leadership and the U.S. Attorney, rather than State, county or municipal leadership, will now bear the responsibility and the accountability to tribal members for public safety on the Yakama Reservation. Following our meetings on the reservation, I am confident that the Nation is committed to carrying the weight of this responsibility.

In March of 2015, FBI finalized a report on the implications of retrocession. This report was written at the request of the Office of Tribal Justice. The report concluded that the impact of retrocession was unknown but indicated similarly sized tribes have experienced positive impacts from retrocession. We note that, as a result of retrocession, FBI and U.S. Attorney's Office will undertake the same role that their sister offices play on dozens of reservations throughout the western United States, including Arizona, Montana, New Mexico, and South Dakota.

On April 30, 2015, I met with the Governor's General Counsel to discuss retrocession. An issue that has been highlighted in several meetings is related to reservation boundaries. We have assured anyone who has asked that this process is not a mechanism for redrawing reservation boundaries. The scope of the Yakama Nation's territorial jurisdiction will be governed by Federal law. The decision before my Office is nothing more than an acceptance of the State's request for retrocession. As explained to the Governor's office, this decision is not intended to affect the boundaries of the reservation in any way. As noted above, this decision does not expand tribal jurisdiction; it merely eliminates State authority over certain offenses on the reservation.

The Department also received correspondence from local government representatives about the retrocession request from the State. For example, a letter from Yakima County, signed by Prosecuting Attorney Joseph A. Brusic, Sheriff Brian Winter, and all three County Commissioners, expressed a strong desire to see the retrocession process succeed. They asked for an opportunity to have discussions with the Nation and the Federal Government in an effort to reach agreement on protocols. We will be happy to convene meetings to help facilitate implementation of retrocession. We note, however, that it would constitute extreme hubris for a Federal official more than 2,500 miles away in Washington, D.C., to attempt to resolve disputes between neighbors in the Yakima Valley. That said, the County's request is consistent with the request of the U.S. Attorney and DOJ, and we certainly are willing to create time and space for such discussions.

We appreciate the unanimous expression of support from Yakima County officials. We expect cooperation to be forthcoming. It is our experience that law enforcement officers tend to share a strong esprit de corps and a mutual respect that crosses jurisdictional and even sovereign lines. It comes from the common experience of performing a very difficult job every day as well as a common commitment to protecting the public. Whatever the views of political leadership, when the chips are down and danger is afoot, officers on the beat tend to support one another. We are confident that, police officers working on the ground will be able to develop agreements on mutual aid, cross-deputation, and other needed mechanisms for cooperation. Indeed, in light of increasing fiscal constraints, cooperation in stretching resources is more important than ever. Moreover, in this age of tremendous scrutiny of law enforcement, it is entirely appropriate that police officers arresting Native Americans on the Yakama Reservation be more responsive to tribal officials. It is also appropriate for tribal suspects to answer to tribal institutions, such as tribal courts and tribal juries. This will increase the legitimacy of criminal justice decisions. We hope that this is one of the many positive outcomes of retrocession.

While Congress assigned the decision on retrocession to officials in Washington, DC, it will require careful cooperation between the Nation and the local subdivisions of state government, such as the counties and municipalities, to make it work well.

In early August of 2015, the Department received the DOJ's response to our letter requesting the Attorney General's views on retrocession. The DOJ declined to state a position in favor of or against retrocession. It did, however, recommend that the Department consider a 6-month waiting period between the date of acceptance and actual transfer of jurisdiction in order to allow for an orderly transfer of authority from the State to the Federal Government.

In deference to the counsel of DOJ, a specific period to allow the relevant agencies to coordinate their actions going forward is granted. I am confident that the Nation, working with the U.S. Attorney's Office and BIA OJS can accomplish all of the tasks needed for actual implementation in six months. Accordingly, our decision is that retrocession will be implemented completely as of 12:01 a.m. PST on April 19, 2016.

It is worth noting one final issue has been raised regarding the extent of retrocession. Washington law clearly sets forth the process for retrocession of civil or criminal jurisdiction in Washington State.³ The process requires the Governor to convene a government-to-government meeting, within 90 days of receiving a retrocession resolution, for the purpose of considering the Nation's resolution.⁴ Within one year of receipt of the resolution the Governor must issue a proclamation, approving the request either in whole or in part, and formally submit the proclamation to the Federal Government.⁵ We understand the Proclamation to be the final product resulting from the formal government-to-government meetings. We also believe that the Proclamation is plain on its face and unambiguous. We worry that unnecessary interpretation might simply cause confusion. If a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of the plain language of the Proclamation. In sum, it is the content of the Proclamation that we hereby accept in approving retrocession.

The Nation has long awaited retrocession and will soon take the next step towards greater control over its tribal justice system. While tribal self-governance has long been the Federal Government's guiding principle for Federal Indian policy, it has been slow in coming in the area of criminal justice. Tribal self-governance is more important in this area of public policy and government service than perhaps any other. It would be difficult for this office to reject an agreement reached between the State of Washington and the Yakama Nation, especially one that seeks to facilitate greater tribal self-governance over a matter as important as law enforcement and public safety. We believe that this step will advance tribal self-governance and tribal sovereignty for the Nation. More importantly, we believe that it will produce improved public safety for the Nation and its people.

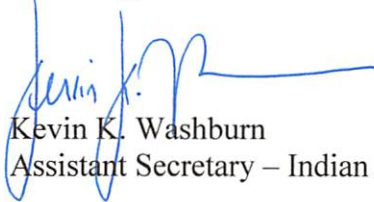
³ RCW 37.12.160.

⁴ See RCW 37.12.160(3).

⁵ See RCW 37.12.160(4).

If you have questions, please contact Mr. Darren Cruzan, Director, Bureau of Indian Affairs, Office of Justice Services, 1849 C Street, NW, Mailstop 2615, Washington, DC 20240, or by telephone (202) 208-5787.

Sincerely,



Kevin K. Washburn
Assistant Secretary – Indian Affairs

cc: Governor, State of Washington
Director, Office of Tribal Justice, U.S. Department of Justice
United States Attorney, Eastern District of Washington

LAW OFFICE OF SKYLAR BRETT

July 13, 2017 - 11:19 AM

Transmittal Information

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Appellate Court Case Number: 34926-8
Appellate Court Case Title: State of Washington v. Donald Joseph Gabriel Zack
Superior Court Case Number: 16-1-01637-1

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